

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

NOAM DAMRI, Individually and on Behalf of  
All Others Similarly Situated,

Plaintiff,

v.

LIVEPERSON, INC., ROB LOCASCIO, and  
JOHN COLLINS,

Defendants.

Case No. 1:23-cv-10517-PAE

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF NOAM DAMRI FOR  
APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF LEAD COUNSEL

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Noam Damri (“Damri”) respectfully submits this memorandum of law in support of his motion, pursuant to Section 21D(a)(3) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78u-4(a)(3), as amended by the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), for an Order: (1) appointing Damri as Lead Plaintiff on behalf of a class (the “Class”) consisting of persons and entities that purchased or otherwise acquired LivePerson, Inc. (“LivePerson” or the “Company”) securities between May 10, 2022 and March 16, 2023, inclusive (the “Class Period”); and (2) approving proposed Lead Plaintiff’s selection of Pomerantz LLP (“Pomerantz”) as Lead Counsel for the Class.

#### PRELIMINARY STATEMENT

The complaint (“Complaint”) (Dkt. No. 1) in the above-captioned action (the “Action”) alleges that the above-captioned defendants (“Defendants”) defrauded investors in violation of the Exchange Act. LivePerson investors, including Damri, incurred significant losses following the disclosure of Defendants’ alleged fraud, which caused LivePerson’s share price to fall sharply, damaging Damri and other LivePerson investors.

Pursuant to the PSLRA, the Court is to appoint as Lead Plaintiff the movant that possesses the largest financial interest in the outcome of the Action and that satisfies the requirements of Federal Rule of Civil Procedure 23 (“Rule 23”). 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). During the Class Period, Damri purchased 500 LivePerson shares, expended \$6,890 on his purchases, retained 50 of his LivePerson shares, and, as a result of the disclosure of Defendants’ alleged fraud, incurred losses of approximately \$375 in connection with his Class Period transactions in LivePerson securities. *See* Declaration of Jeremy A. Lieberman in Support of Motion (“Lieberman Decl.”), Exhibit (“Ex.”) A. Accordingly, Damri believes that he has the largest financial interest in the relief sought in this Action. Beyond his considerable

financial interest, Damri also meets the applicable requirements of Rule 23 because his claims are typical of absent Class members and because he will fairly and adequately represent the interests of the Class.

To fulfill his obligations as Lead Plaintiff and vigorously prosecute the Action on behalf of the Class, Damri has selected Pomerantz as Lead Counsel for the Class. Pomerantz is highly experienced in the areas of securities litigation and class actions and has successfully prosecuted numerous securities litigations and securities fraud class actions on behalf of investors, as detailed in the firm's resume.

Accordingly, Damri respectfully requests that the Court enter an Order appointing Damri as Lead Plaintiff for the Class and approving his selection of Pomerantz as Lead Counsel for the Class.

#### STATEMENT OF FACTS

As alleged in the Complaint in the Action, LivePerson delivers mobile and online messaging solutions through Conversational Artificial Intelligence. In February 2022, the Company acquired WildHealth, Inc. ("WildHealth"), a precision medicine service which purportedly "leverages advanced machine learning to combine DNA analysis, biometrics, microbiome testing and phenotypic data to provide people with a blueprint for truly optimized health and a maximized health span." As part of its business model, WildHealth often receives reimbursements for providing services to certain Medicare programs.

In November 2022, unbeknownst to investors, WildHealth received notice that reimbursements for its services rendered under a Medicare demonstration program related to COVID-19 testing (the "Program") were suspended pending further review.

Throughout the Class Period, Defendants made materially false and misleading statements regarding the Company's business, operations, and prospects. Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (i) the Company's disclosure controls and procedures contained a material weakness; (ii) accordingly, LivePerson maintained deficient internal controls over its financial reporting; (iii) as a result, LivePerson's Q3 2022 financial statements failed to disclose the suspension of WildHealth's Medicare reimbursements in connection with the Program and the resulting negative impact on the Company's future revenues; (iv) accordingly, LivePerson had overstated the Company's future financial position and/or prospects; and (v) as a result, the Company's public statements were materially false and misleading at all relevant times.

On February 28, 2023, before market hours, LivePerson issued a Notification of Late Filing on Form 12b-25 regarding its Annual Report on Form 10-K for the year ended December 31, 2022 (the "2022 10-K"). Among other things, the notification revealed that, as a result of LivePerson's acquisition of WildHealth, "the Company requires more time to perform additional review and testing of revenue recognition with respect to a recently discontinued WildHealth program, for which Medicare reimbursement is suspended pending further governmental review, and to complete its in-process review of internal controls and procedures."

On this news, LivePerson's share price fell \$1.69 per share, or 14.31%, to close at \$10.12 per share on February 28, 2023.

Then on March 6, 2023, before market hours, the Company issued a current report on Form 8-K which disclosed that "the referenced review of WildHealth revenue is anticipated to affect fourth quarter 2022 revenue attributable to WildHealth's participation in a Medicare

demonstration program, due to suspension in November 2022 of Medicare reimbursements under the program and pending further governmental review.”

On this news, LivePerson’s share price fell \$0.78 per share, or 6.8%, to close at \$10.69 per share on March 7, 2023.

Then, on March 15, 2023, after market hours, the Company issued a press release announcing its Q4 2022 financial results on Form 8-K, which provided that “[t]otal revenue was \$122.5 million for the fourth quarter of 2022, a decrease of 1% as compared to the same period last year” and “[w]ithin total revenue, business operations revenue for the fourth quarter of 2022 decreased 1% from the comparable prior-year period to \$113.0 million, and revenue from consumer operations decreased 3% from the comparable prior-year period to \$9.4 million.”

Finally, on March 16, 2023, before market hours, the Company filed the 2022 10-K with the SEC. The 2022 10-K revealed that “due to certain control deficiencies which aggregated to a material weakness in the Company’s internal control over financial reporting as further described below, our disclosure controls and procedures were not effective as of December 31, 2022” and “[t]he control deficiencies, which in aggregate constitute a material weakness, were identified in connection with the Company’s previously disclosed review of certain transactions related to its subsidiary WildHealth.”

On this news, LivePerson’s share price fell \$5.64 per share, or 57.73%, to close at \$4.13 per share on March 16, 2023, damaging investors.

As a result of Defendants’ wrongful acts and omissions, and the precipitous decline in the market value of the Company’s securities, Damri and other Class members have suffered significant losses and damages.



## ARGUMENT

## I. DAMRI SHOULD BE APPOINTED LEAD PLAINTIFF

Damri should be appointed Lead Plaintiff because he has timely filed a motion for appointment as Lead Plaintiff, has the largest financial interest in the Action to his knowledge, and otherwise strongly satisfies the requirements of Rule 23.

The PSLRA requires the plaintiff who files an action governed by its provisions to publish a notice (the “Notice”) to the class within 20 days of filing the action, informing putative class members of: (1) the pendency of the action; and (2) their right to file a motion for appointment as lead plaintiff within 60 days after publication of the Notice. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i). In addition, the PSLRA directs courts to consider any motion to serve as lead plaintiff filed by class members in response to the Notice and to do so by the later of (1) 90 days after the date of publication, or (2) as soon as practicable after the Court decides any pending motion to consolidate. *See id.* § 78u-4(a)(3)(B).

Pursuant to the PSLRA, the Court “shall appoint” the “most adequate plaintiff” to serve as lead plaintiff. *Id.* § 78u-4(a)(3)(B)(i). The PSLRA provides a “[r]ebutable presumption” that the “most adequate plaintiff” is the person or group that:

- (aa) has either filed the complaint or made a motion in response to a notice . . .;
- (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
- (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

*Id.* § 78u-4(a)(3)(B)(iii)(I).

As set forth below, Damri satisfies all three of these criteria and thus is entitled to the presumption that he is the most adequate plaintiff of the Class and, therefore, should be appointed Lead Plaintiff for the Class.

A. Damri Is Willing to Serve as Class Representative

On December 1, 2023, Pomerantz, counsel for plaintiff in the Action, caused the statutorily required Notice of this Action to be published via *Newsfile Corp.* pursuant to Section 21D(a)(3)(A)(i) of the PSLRA, which announced that this Action had been filed against LivePerson and other defendants, and which advised investors in LivePerson securities that they had 60 days from the date of the Notice’s publication—*i.e.*, until January 30, 2024—to file a motion to be appointed as lead plaintiff. *See* Lieberman Decl., Ex. B.

Damri has filed the instant motion pursuant to the Notice and has attached a sworn Certification attesting that he is willing to serve as a representative for the Class and to provide testimony at deposition and trial, if necessary. *See id.*, Ex. C. Accordingly, Damri satisfies the first requirement to serve as Lead Plaintiff of the Class.

B. Damri Has the “Largest Financial Interest” in the Action

The PSLRA requires a court to adopt a rebuttable presumption that “the most adequate plaintiff . . . is the person or group of persons that . . . has the largest financial interest in the relief sought by the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii). To the best of his knowledge, Damri has the largest financial interest of any LivePerson investor or investor group seeking to serve as Lead Plaintiff. For claims arising under the Exchange Act, courts frequently assess financial interest based upon the four factors articulated in the seminal case *Lax v. First Merchants Acceptance Corp.*: (1) the number of shares purchased during the class period; (2) the number of net shares purchased during the class period; (3) the total net funds expended during the class

period; and (4) the approximate losses suffered. No. 97 C 2715, 1997 WL 461036, at \*5 (N.D. Ill. Aug. 6, 1997). In accord with other courts nationwide,<sup>1</sup> these *Lax* factors have been adopted and routinely applied by courts in this District. *See, e.g., Chahal v. Credit Suisse Grp. AG*, No. 18-CV-2268 (AT) (SN), 2018 WL 3093965, at \*4 (S.D.N.Y. June 21, 2018); *Nurlybaev v. ZTO Express (Cayman) Inc.*, No. 17-CV-06130 (LTS) (SN), 2017 WL 5256769, at \*1 (S.D.N.Y. Nov. 13, 2017); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. LaBranche & Co.*, 229 F.R.D. 395, 404-05 (S.D.N.Y. 2004).

During the Class Period, Damri: (1) purchased 500 LivePerson shares; (2) expended \$6,890 on his purchases of LivePerson securities; (3) retained 50 of his LivePerson shares; and (4) as a result of the disclosure of Defendants' alleged fraud, incurred losses of approximately \$375 in connection with his Class Period transactions in LivePerson securities. *See* Lieberman Decl., Ex. A. To the extent that Damri possesses the largest financial interest in the outcome of this litigation, he is the presumptive "most adequate" plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

#### C. Damri Otherwise Satisfies the Requirements of Rule 23

Section 21D(a)(3)(B)(iii)(I)(cc) of the PSLRA further provides that, in addition to possessing the largest financial interest in the outcome of the litigation, a lead plaintiff must "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." Rule 23(a) provides that a class action may proceed if the following four requirements are satisfied:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

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<sup>1</sup> *See, e.g., In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 295 (E.D.N.Y. 1998); *accord In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG) (RER), 2007 WL 680779, at \*6-8 (E.D.N.Y. Mar. 2, 2007); *In re Cendant Corp. Litig.*, 264 F.3d 201, 262 (3d Cir. 2001).

Fed. R. Civ. P. 23(a).

In making its determination that a lead plaintiff movant satisfies Rule 23's requirements, the Court need not raise its inquiry to the level required in ruling on a motion for class certification. Instead, "[t]he parties moving for lead plaintiff are only required to make a prima facie showing that they meet [the requirements of] Rule 23." *Aude v. Kobe Steel, Ltd.*, No. 17-CV-10085 (VSB), 2018 WL 1634872, at \*3 (S.D.N.Y. Apr. 4, 2018) ); *see also Kaplan v. Gelfond*, 240 F.R.D. 88, 94 (S.D.N.Y. 2007) ("[A]t this stage of the litigation, only a preliminary showing of typicality and adequacy is required."). In addition, "[t]ypicality and adequacy of representation are the only provisions [of Rule 23] relevant to a determination of lead plaintiff under the PSLRA." *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998) (citing *Gluck v. CellStar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex. 1997), and *Fischler v. AMSouth Bancorporation*, No. 96-1567-Civ-T-17A, 1997 WL 118429, at \*2 (M.D. Fla. Feb. 6, 1997)); *Olsten*, 3 F. Supp. 2d at 296. Moreover, the Complaint in the Action sufficiently pleads Rule 23(a)(1) numerosity and Rule 23(a)(2) common questions in a manner common to all Class members, including Damri.

The typicality requirement of Rule 23(a)(3) "is satisfied if 'each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *In re Orion Sec. Litig.*, No. 08 Civ. 1328 (RJS), 2008 WL 2811358, at \*5 (S.D.N.Y. July 7, 2008) (quoting *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992)). "[T]he claims of the class representative need not be identical [to] those of all members of the class. '[T]he typicality requirement may be satisfied even if there are factual dissimilarities or variations between the claims of the named plaintiffs and those of other class members, including distinctions in the qualifications of the class members.'" *Janbay v.*

*Canadian Solar, Inc.*, 272 F.R.D. 113, 120 (S.D.N.Y. 2010) (quoting *Bishop v. N.Y. City Dep't of Hous. Pres. & Dev.*, 141 F.R.D. 229, 238 (S.D.N.Y. 1992)).

Damri's claims are typical of those of the Class. Damri alleges, like other Class members, that Defendants violated the Exchange Act by making what they knew or should have known were false or misleading statements of material facts concerning LivePerson, or by omitting to state material facts necessary to make the statements they did make not misleading. Damri, like other Class members, purchased LivePerson securities during the Class Period at prices alleged to have been artificially inflated by Defendants' misrepresentations or omissions, and was damaged upon the disclosure of those misrepresentations and/or omissions that drove LivePerson's share price downward. These shared claims, which are based on the same legal theory and arise from the same events and course of conduct as the Class's claims, satisfy the typicality requirement of Rule 23(a)(3).

The adequacy of representation requirement of Rule 23(a)(4) is satisfied where "(1) class counsel is qualified, experienced, and generally able to conduct the litigation; (2) there is no conflict between the proposed lead plaintiff and the members of the class; and (3) the proposed lead plaintiff has a sufficient interest in the outcome of the case to ensure vigorous advocacy." *Foley v. Transocean Ltd.*, 272 F.R.D. 126, 131 (S.D.N.Y. 2011); *see also Dookeran v. Xunlei Ltd.*, No. 18-cv-467 (RJS), 2018 WL 1779348, at \*2 (S.D.N.Y. Apr. 12, 2018) (same).

As set forth in greater detail below, in Pomerantz, Damri has retained counsel highly experienced in vigorously and efficiently prosecuting securities class actions such as this Action, and submits his choice of Pomerantz to the Court for approval as Lead Counsel for the Class pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v). There is no evidence of antagonism or conflict between Damri's interests and those of the Class. Moreover, Damri has submitted a signed

Certification declaring his commitment to protect the interests of the Class (*see* Lieberman Decl., Ex. C), and his significant financial interest demonstrates that he has a sufficient interest in the outcome of this litigation to ensure vigorous advocacy.

Further demonstrating his adequacy, Damri has submitted a signed Declaration attesting to, *inter alia*, his background, his investing experience, his understanding of the responsibilities of a Lead Plaintiff pursuant to the PSLRA, his decision to seek appointment as Lead Plaintiff, and the steps that he is prepared to take to prosecute this litigation on behalf of the Class. *See id.*, Ex. D.

**D. Damri Will Fairly and Adequately Represent the Interests of the Class and Is Not Subject to Unique Defenses**

The presumption in favor of appointing Damri as Lead Plaintiff may be rebutted only upon proof “by a member of the purported plaintiff class” that the presumptively most adequate plaintiff:

- (aa) will not fairly and adequately protect the interests of the class; or
- (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

Damri’s ability and desire to fairly and adequately represent the Class has been discussed above. Damri is not aware of any unique defenses Defendants could raise that would render him inadequate to represent the Class. Accordingly, Damri should be appointed Lead Plaintiff for the Class.

**II. LEAD PLAINTIFF’S SELECTION OF COUNSEL SHOULD BE APPROVED**

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to Court approval. *See id.* § 78u-4(a)(3)(B)(v). The Court should only interfere with a lead plaintiff’s choice if necessary to “protect the interests of the class.” *Id.* § 78u-

4(a)(3)(B)(iii)(II)(aa); *see also Kaplan v. S.A.C. Capital Advisors, L.P.*, 311 F.R.D. 373, 383 (S.D.N.Y. 2015) (“The PSLRA evidences a strong presumption in favor of approving a properly-selected lead plaintiff’s decisions as to counsel selection and counsel retention.” (quoting *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 398 (S.D.N.Y. 2008))); *In re Molson Coors Brewing Co. Sec. Litig.*, 233 F.R.D. 147, 151 (D. Del. 2005).

Here, Damri has selected Pomerantz as Lead Counsel for the Class. Pomerantz is highly experienced in the areas of securities litigation and class actions and has successfully prosecuted numerous securities litigations and securities fraud class actions on behalf of investors, as detailed in its firm resume submitted herewith. *See Lieberman Decl., Ex. E.* In overview, Pomerantz is a premier firm in the area of securities litigation based in New York, with offices in Chicago, Los Angeles, Paris, France, London, the U.K., and Tel Aviv, Israel. *See id.* For more than 85 years, Pomerantz has represented defrauded investors. *See id.* As lead counsel in *In re Petrobras Securities Litigation*, No. 14-cv-09662 (S.D.N.Y.), Pomerantz secured a recovery of \$3 billion on behalf of investors in the securities of Petrobras, the largest settlement ever in a class action involving a foreign issuer and the fifth largest class action settlement ever achieved in the United States. *See id.* Petrobras is part of a long line of record-setting recoveries led by Pomerantz, including the \$225 million settlement in *In re Comverse Technology, Inc. Securities Litigation*, No. 1:06-cv-01825 (E.D.N.Y.), in June 2010, and the \$90 million settlement in *Klein v. Altria Group, Inc. et al*, No. 3:20-cv-00075 (E.D. Va.) in March 2022. *See id.*

As a result of its extensive experience in litigation involving issues similar to those raised in the instant Action, Damri’s counsel, Pomerantz, has the skill, knowledge, expertise, and experience that will enable the firm to prosecute this Action effectively and expeditiously. Thus,

the Court may be assured that by approving Damri's selection of Pomerantz as Lead Counsel, the members of the Class will receive the best legal representation available.

### CONCLUSION

For the foregoing reasons, Damri respectfully requests that the Court issue an Order: (1) appointing Damri as Lead Plaintiff for the Class; and (2) approving Damri's selection of Pomerantz as Lead Counsel for the Class.

Dated: January 30, 2024

Respectfully submitted,

POMERANTZ LLP

/s/ Jeremy A. Lieberman

Jeremy A. Lieberman

J. Alexander Hood II

Thomas H. Przybylowski

600 Third Avenue, 20th Floor

New York, New York 10016

Telephone: (212) 661-1100

Facsimile: (917) 463-1044

jalieberman@pomlaw.com

ahood@pomlaw.com

tprzybylowski@pomlaw.com

*Counsel for Noam Damri and Proposed Lead  
Counsel for the Class*

THE LAW OFFICE OF JACOB SABO

Jacob Sabo

22a Mazzeh Street

Tel-Aviv, Israel

Telephone: (++972) 39070770

*Additional Counsel for Noam Damri*